No. 85-194

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

MICHAEL AND ELISABETH ERLBAUM,

Petitioners,

vs.

THOMAS CLEM AND REBECCA CLEM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Did the Court of Appeals err in accepting the representation made by respondents' attorney at oral argument that the petitioners had not been precluded from presenting their defenses of waiver, estoppel and immaterial breach, when in fact, the record reflected that the petitioners had been precluded from presenting those defenses?

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No.

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October Term, 1985

MICHAEL AND ELISABETH ERLBAUM,

Petitioners,

vs.

THOMAS AND REBECCA CLEM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying the petitioners a new trial.

OPINION BELOW

The opinion of the Court of Appeals is unreported. A copy of the opinion is attached hereto as Appendix A (1a).

JURISDICTION

The opinion of the Court of Appeals was filed on May 23, 1985. A timely petition for rehearing was denied on June 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On appeal to the Third Circuit, the petitioners sought a new trial on the ground that the District Court had erroneously precluded them from presenting their defenses of waiver, estoppel and immaterial breach.[1] At oral argument, the respondents' counsel, a former federal judge, represented that the lower court had *not* precluded the petitioners from presenting their defenses. The Third Circuit, ignoring the record, accepted the foregoing representation, and denied the petitioners a new trial on that basis (Appendix at 4a). The record, which the Third Circuit failed to consider is as follows.

At an April 18, 1984, hearing on a motion in limine, the District Court held that the petitioners were precluded, as a matter of law, from ever presenting their defenses of waiver, estoppel and immaterial breach. "I don't want to know who said what to whom or why . . . .This case will be tried on damages only." (Appendix at 30a). As a result, at trial, the petitioners were, in fact, precluded from presenting any of their defenses. They were precluded from presenting *any* testimony from *any* witness (Appendix at 32a-37a).[2]

---

1. The jurisdiction of the District Court was based upon Section 1332(a)(1) of the United States Judicial Code.

2. For example, on pages 33a-34a of the Appendix, the following interchange took place as part of the offer of proof:

(Cont'd)

In its opinion, the Third Circuit cited the lower court's April 18, 1984, written order precluding testimony about compromise

---

(Cont'd)

> MR. WINDT (counsel for petitioners): I don't have to go into detail as to what each witness would testify, because Judge Luongo held it doesn't matter what anyone would testify; it is precluded as a matter of law.
>
> THE COURT: I think probably counsel are in agreement—would this not be true, Mr. Cullen, this is a sufficient offer of proof, but I think probably you ought to name the witnesses.
>
> Is that agreeable to you, Mr. Cullen?
>
> MR. CULLEN (counsel for respondents): That's correct, Your Honor.

See also, page 30a-31a of the Appendix (first day of trial).

> MR. WINDT: The ruling, as it is set forth in the transcript is because Michael Erlbaum signed the contract which had a provision in it saying that you can't orally modify the contract, that any negotiations or discussions between the parties which might result in waiver and estoppel, and therefore a defense, cannot be put into evidence, that is, we have no defense to liability, you can't change the terms of the contract . . .
>
> THE COURT: . . .[I]t appears to me that Judge Luongo has issued a very, very broad ruling. This is not my ruling, but I am bound by it . . .

Accord, Appendix 31a-32a ("What he [Judge Luongo] made clear was, whatever in a conversation may have happened which we would argue in our defense created waiver and estoppel I can't put in for waiver and estoppel"); and at 35a ("Judge Luongo has ruled that regardless of what testimony I put on it would be irrelevant").

negotiations, but that is manifestly *not* the order that was applied by the trial judge (a different judge than who had entered the April 18 order). As discussed above, the trial judge, applying the oral order quoted above, precluded any testimony by any witness in support of the petitioners' defenses (Appendix at 32a-37a).

And why did the trial judge so apply that oral order? Because he was instructed to by the previous judge, Judge Luongo. Immediately prior to the commencement of the trial, Judge Luongo advised the trial judge that the petitioners were not allowed to put on a defense:

> THE COURT: Let me explain the situation.
>
> This is a case where there was a contract to purchase an estate out of our part of the country, LaRonda, for a million dollars and for one reason or another there was a breach.
>
> The suit now is on the two drafts that were drawn by husband and wife in a cash reserve account and the drafts were dishonored and the suit, as I understood Mr. Cullen's statement, I made a ruling in a Motion in Limine. The ruling that I made caused the defendants to acknowledge that there is a breach. There is no defense.
>
> The only issue is what amount of damages and the suit itself actually on these two drafts totalling $150,000 representing the down payments. [Appendix at 22a.]

REASONS FOR GRANTING THE WRIT

The Third Circuit has, in this case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. As detailed above, the record *clearly* shows that the petitioners were precluded from offering any evidence in support of any of their defenses. Nevertheless, the Third Circuit, ignoring the record, accepted as true the representation of respondents' counsel, a former federal judge, that the petitioners had been allowed to offer evidence in support of their defenses. The Third Circuit's cavalier attitude and deference to a former federal judge has resulted in a travesty of justice.

The petitioners were found liable, as a matter of law, because they did not fund the down payment checks that they had given to the respondents in connection with the purchase of certain property. The petitioners, had they been allowed to put on a defense, would have shown that the reason they did not fund the down payment monies was because the respondents told them that it was not yet necessary to do so, and that, had the respondents told them that they had changed their minds, the down payment would promptly have been paid (Appendix at 26a-27a, 28a-29a, 32a-34a, 36a).[3] In other words, the testimony would have shown that the Erlbaum's did not breach the contract (by failing to fund the down payment monies) because they were never given the opportunity to make such payment after the respondents changed their minds and decided that they wanted it paid.

---

3. The petitioners' offer of proof included seven witnesses—both respondents, the respondents' attorney in the underlying transaction, both petitioners, and two third parties. They would have testified "about Michael Erlbaum's willingness at all times to comply with the original terms of the written contract if the Clems had so desired." [Appendix 33a-34a].

The following hypothetical is illustrative. Assume a contract (which cannot be orally modified) provides that $1,000 will be paid in a week, and $100,000 will be paid two months later. The seller thereafter tells the buyer that he can pay nothing in a week and can, instead, pay $102,000 in two months. As a result, the buyer does not make the $1,000 payment, and the seller then, without notice, tells the buyer that he is in breach.

That is this case. The issue is not whether the seller's promise to accept nothing in a week and $102,000 in two months is enforceable. (It is not.) The issue is whether, having led the buyer to believe that he did not need to pay the $1,000, the seller can hold the buyer in breach without giving the buyer the opportunity to pay the $1,000 after being informed of the seller's change of mind. On that issue, it is hornbook law that the buyer must be given the opportunity to pay the $1,000, and that is precisely this case.[4] *See. e.g., 5 Williston on Contracts* §689 at 309 (3d ed. 1957) ("the waiver may be withdrawn and the condition reimposed if the promisor gives notice thereof before change of position in reliance upon it and while there is still reasonable time for performance of the condition"); *Id.* at §690 at 314 ("waiver of performance of an obligation, which means permission not to perform it, excuses the obligor from performing so long as the waiver or permission continues"); 3A *Corbin on Contracts* §754 at 494-95 (1950 ed.) ("Any expressions or conduct of the obligee that leads the obligor reasonably to believe that performance on time will not be insisted on will operate as a waiver of the time condition . . .Such an effect can be avoided by the obligee by a definite statement to the obligor that he means no such waiver and will insist *thereafter* on payments as agreed"); *Id.* §764 at 532-33 ("A vendor who had deprived himself, by a mere waiver,

4. In other words, a buyer cannot trick a seller into not following the terms of a contract, and then sue for breach.

of the advantages of a provisions for a forfeiture in case of failure to pay on time, has power to terminate the effect of such a waiver by giving notice to the obligor of such intention . . .[A]fter giving notice, the obligor must be given a reasonable time within which to make payments of installments that are overdue or are then falling due. Until the expiration of this reasonable time after receipt of notice, the previously existing waiver is still operative"); *Restatement Second of Contracts* §150, Comment C ("Where an unenforceable modification of an enforceable contract operates as a waiver affecting an executory portion of the contract, the waiving party may retract the waiver by reasonable notification received by the other party. The original terms are then reinstated unless restatement would be unjust in view of a material change of position in reliance on the waiver").

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

PAUL R. ROSEN
ALLAN D. WINDT

SPECTOR COHEN GADON &
ROSEN. P.C.

Attorneys for Respondent

APPENDIX A—MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1655

CLEM, THOMAS E.; CLEM, REBECCA J.

vs.

ERLBAUM, MICHAEL; ERLBAUM, ELISABETH

vs.

KANIA, ARTHUR: KANCO, INC.

Michael and Elisabeth Erlbaum, Appellants

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 83-0772
District Judge: Honorable Thomas N. O'Neill, Jr.

Argued May 13, 1985

Before: HUNTER, SLOVITER, *Circuit Judges,* and COHEN,*
District Judge

---

* Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

Appendix A

Opinion filed May 23, 1985

MEMORANDUM OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On December 15, 1982, appellees, Thomas E. Clem and Rebecca J. Clem put two parcels of real estate up for auction. At the auction, appellants, Michael Erlbaum and Elisabeth Erlbaum bid one million dollars for the two parcels. Under the advertised terms of the auction, and the negotiated terms of the agreement of sale between the Clems and the Erlbaums, the Erlbaums were required to pay a 15% deposit on the real estate. Both Michael and Elisabeth Erlbaum signed two checks for the deposit in the total amount of $150,000. When the Clems attempted to negotiate the checks, the bank dishonored them. The Clems then presented the checks to the Erlbaums for payment and the Erlbaums refused to pay.

2. On January 4, 1983, the Clems cancelled the contract. They then proceeded to find another buyer for the properties at a price of $800,000, and commenced this diversity action to recover damages incurred as a result of the Erlbaum's failure to fund the deposit checks and fulfill the terms of the agreement. The district court found the Erlbaums liable for $150,000 in damages on two theories. First, the Uniform Commercial Code dictates that absent a proper defense, the Erlbaums must pay duly signed negotiable checks. Second, the district court concluded that the Clems' could recover $150,000 in liquidated damages by virtue of the Erlbaum's breach of the Agreement of Sale. We hold that the district court acted properly in all respects.

3. Statutory and case law amply support the district court's conclusion that the Erlbaums were unconditionally liable to pay the two checks. Under 13 Pa. Con. Stat. Ann. § 3104 (1982), a check, signed by the maker or drawer, is an unconditional promise to pay a sum certain in money, on demand or at a specific time, to order or to bearer. The checks involved here unquestionably fulfilled these requirements. The Clems, therefore, as holders of the checks, are entitled to payment unless the Erlbaums can establish a legitimate defense. *See Tudesco v. Wilson,* 163 Pa. Super. 352, 60 A.2d 388 (1948). The Erlbaums claim lack of consideration as their defense. 13 Pa. Con. Stat. Ann. § 3306 (1982). The district court rejected this asserted defense, reasoning that the Clems' promise to sell the properties and withdrawal of the properties from the market constituted sufficient consideration. Accordingly, the district court properly ruled that the Clems were entitled to judgment in the amount of $150,000 plus interest simply based on the Erlbaums' failure to fund the checks.

4. As an alternative grounds for a $150,000 award to the Clems, the district court found the Erlbaums' jointly liable for liquidated damages. Clause 13 of the contract between the Clems and the Erlbaums allowed the seller, upon the buyer's failure to settle as agreed, to retain the deposit or "resort to any other action or remedy in law or equity that may be appropriate." App. at 49. Although the Erlbaums never funded the deposit checks, and therefore the Clems could not retain the money as liquidated damages, we agree with the district court that clause 13, in effect, sets the liquidated damages at the amount of the required deposit.

5. Appellants present three issues for our resolution. First, they argue that the Clems are not entitled to either liquidated damages or damages under the contract at all. Second, they

contend that there was insufficient evidence to support the jury's verdict that Mrs. Erlbaum was a party to the agreements of sale for the two parcels of lands. Finally, they argue that when the district court ruled inadmissible evidence of conversations between the parties' attorneys after the checks had been dishonored and the deal was falling through, he prevented them from defending on the basis of equitable estoppel, waiver and immaterial breach. For the reasons that follow, we find that none of the appellants' contentions have merit.

6. To refute the district court's ruling on damages, the Erlbaums argue, in sum, that the Clems' complaint contained no prayer for liquidated damages, and therefore they are precluded from seeking or receiving anything but actual damages. Then, they say, since the Clems proceeded to trial on a theory of liquidated damages, they should receive no damages whatsoever. We see absolutely no merit in this argument. First, the Clems' complaint, in I and II, said that the Erlbaums had entered into an agreement of sale, calling for a $150,000 deposit, had given the checks and the checks were never paid. The complaint further states that the Erlbaums' actions breached the conditions of the auction as well as the conditions of the agreement of sale. The agreement of sale contains clause 13 which the district court correctly interpreted to set a liquidated damage amount of $150,000 in case of default by the buyer. The Erlbaums, despite their somewhat convoluted contentions that they were always willing to go through with the sale if certain amendments were made to the agreement, clearly defaulted on their obligation to produce a $150,000 deposit. We conclude, therefore, that the district court correctly concluded that the Erlbaums were liable for their breach of the Agreement of Sale.

7. The Erlbaums also contest the amount of the liquidated damages. They claim that the liquidated damages clause is void

as a penalty. As the district court correctly noted, to determine the validity of a liquidated damages clause in a contract, the court must examine "all the circumstances to determine whether a liquidated damages clause is reasonable. In making this determination, [it] must consider (among other things) the difficulty, if any, of determining actual damages." App. at 51. Having correctly stated Pennsylvania law, the district court went on to examine the facts in this case and held that the clause was fair. Our independent review of the facts leads us to conclude that the district court properly upheld the clause and did not err in finding that $150,000 was a reasonable estimate of actual damages.

8. The Erlbaums' also ask us to upset the jury's finding that Elisabeth Erlbaum was liable on the contract for sale of the properties. To do so, we must find that no rational juror, evaluating the facts in the case in the light most favorable to the Clems, could have concluded that Elisabeth Erlbaum was a party to the agreement. While Mrs. Erlbaum did not attend the auction, she signed the disputed deposit checks and the jury believed she manifested an intent to become a party to the agreement. We cannot say that no rational juror could have so concluded.

9. Finally, the Erlbaums contend that the district court ruled, as a matter of law, that they could not defend on the basis of waiver, estoppel or immateriality of the breach. In fact, the district court simply made an *in limine* ruling that "any testimony regarding communications allegedly made during compromise negotiations for the legal dispute that is the subject matter of this case is inadmissible for any purpose at the trial of this case." Supp. App. at 308-09. We may only upset the ruling if we find the district court abused its discretion. Federal Rule of Evidence 408, as well as the weight of the case law in Pennsylvania, support the district court's exclusion of the evidence. *See United States*

v. 29.16 Acres, More or Less, 496 F. Supp. 924, 928 (E.D. Pa. 1980) (Evidence of subsequent oral modifications of agreement excluded under parole evidence rule, Pennsylvania Statute of Frauds, and clause in agreement prohibiting all but written modifications); *C.I.T. Corp. v. Jonnet,* 419 Pa. 435, 438, 214 A.2d 620 (1965) (need clear and convincing proof of waiver of provision prohibiting oral modifications otherwise "written documents would have no more permanence than writings penned in disappearing ink.").

10. Accordingly, the judgment of the district court will be affirmed and the Erlbaums must pay the Clems $150,000 plus interest from the date of the dishonor of the checks.

TO THE CLERK:

Please file the foregoing opinion.

/s/ James Hunter, III
Circuit Judge

APPENDIX B—MOTION PAPERS FILED IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WITH ANNEXED TRANSCRIPT

June 10, 1985

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1655

CLEM, THOMAS E., et al.

vs.

ERLBAUM, MICHAEL, et al., Appellants

vs.

KANIA, ARTHUR, et al.

Present: HUNTER, *Circuit Judge*

1. Appellants' Motion for leave to supplement appendix as appended to their petition for rehearing.

2. For your information, the opinion was filed and judgment entered on May 23, 1985. The petition for rehearing is presently pending.

in the above-entitled case. Any answer which would be due by June 17, 1985, will be forwarded to you upon receipt of same.

Appendix B

Respectfully,

/s/ Michelle Leverette
Deputy Clerk
DIRECT DIAL
597-3134

enc.

The foregoing Motion is/are granted.

By the Court,

/s/ Hunter
Circuit Judge

Dated: June 12, 1985

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1655

THOMAS E. and REBECCA J. CLEM,

Appellees

v.

MICHAEL and ELISABETH ERLBAUM,

Appellants

APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT NO. 83-0772

(Received June 7, 1985)

APPELLANTS' MOTION FOR LEAVE TO SUPPLEMENT APPENDIX AS APPENDED TO THEIR PETITION FOR REHEARING

The Appellants are seeking rehearing because this Court, based upon a fundamental misapprehension of the lower court's ruling, failed even to address the primary issue presented by this appeal.

The Appellants sought a new trial because they were precluded from presenting their defenses of waiver, estoppel and immaterial

breach. This Court denied the Appellants a new trial because it believed that the lower court had precluded the Appellants solely from offering testimony regarding compromise negotiations. The transcript of the judge's comments made in chambers immediately before the trial began conclusively shows that the Appellants were precluded from presenting *any* evidence in support of *any* of their defenses. The Appellants, therefore, hereby seek leave to supplement the appendix with that transcript in order to assist this Court in ruling on their Petition for Rehearing.

SPECTOR COHEN GADON & ROSEN

/s/ Allan D. Windt

ALLAN D. WINDT
1700 Market Street
Philadelphia, PA 19103
(215) 241-8888

Date: June 7, 1985

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 83-0772

THOMAS E. CLEM and REBECCA J. CLEM

Plaintiffs

vs

MICHAEL ERLBAUM and ELISABETH ERLBAUM

Defendants

Philadelphia, Pennsylvania

Monday, June 4, 1984

BEFORE: THE HONORABLE ALFRED LUONGO, J.
(AND A JURY)

VERTHELIA V. MILLER
Official Court Reporter
Room 2722, U.S. Court House
Philadelphia, Pa. 19107
215-925-5205

Appendix B

[2] APPEARANCES:

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BY: ALLAN D. WINDT, Esq.,
and
PAUL R. ROSEN, Esq.,
1700 Market Street, 29th Floor
Philadelphia, Pa., 19103
Counsel for the Defendants

Appendix B

[3] PROCEEDINGS

(The following took place in open court.)

MR. WINDT: First of all, Your Honor, I suggested to Mr. Cullen that we stipulate to a majority verdict rather than a unanimous, to be sure to get a decision today.

MR. CULLEN: I have not agreed to that. I have to consult with my client.

THE COURT: That is something that can be taken care of at the end of trial, if necessary.

MR. WINDT: Secondly, Your Honor, Mrs. Erlbaum is still in the case and for a host of reasons I think we can dismiss her out pretrial.

The contract is covered by the statute. She didn't sign. As you may recall, the checks that Michael Erlbaum gave at the day of the down payment required two signatures and his wife signed.

THE COURT: Even if you can conceive that as a promise to pay there is no consideration for it.

Moreover, I am surprised that Ray seems to be interested in keeping her in the case.

They signed a Motion in Limine that because of the contract Michael signed you can't have oral things. If you keep Mrs. Erlbaum in the case she didn't sign a contract.

But apart from all that, I think it is open and [4] shut. If

you conceive her signature as a promise to pay, there is no consideration for it.

MR. CULLEN: The answer, Your Honor,, is we are only seeking to hold her in to the first complaint, which is on the commission. She signed the checks and that is a promise to pay. There was consideration for the checks. She signed the checks and her husband signed the contract and that is consideration. She accepted that as consideration when she signed it.

THE COURT: If there is objections to removal of Mrs. Erlbaum as defendant I have to consider that.

MR. WINDT: I will want the waiver of estoppel . . .

THE COURT: You are talking about her signing a check to enable her husband to comply with the requirements of an auction bid for 10 or 15 percent deposit.

MR. CULLEN: If you recall, from the Motion in Limine our defense is the reason that check was never honored is because of a combination of things.

Mr. and Mrs. Clem were at all times willing to comply with the terms of the contract. The check was not honored because the plaintiffs' agent represented it was not necessary to honor it because of the on-going Motion.

It was not put into writing. It was only agreed to, but regardless, Your Honor, the plaintiffs after they decided not to modify the contract in any way never came back to the Erlbaums and said, we are going to insist on the [5] initial terms of the contract. Now you honor the check, which they would have done. It is a clear case of waiver and estoppel.

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Your Honor precluded us from putting on our defense because Michael Erlbaum signed the contract, saying oral modifications of the written contract are not enforceable. That doesn't bind Mrs. Erlbaum. I am not sure what the contract was. If there was consideration, it had to be real estate. She had her own contract. She never signed the other contract.

So I will have to call my witness and I presume you have no problem with it.

THE COURT: I would have no problem sustaining the objection to that testimony.

Now let's move on.

MR. WINDT: The next thing, Your Honor, is I would like a prefatory statement which I submitted previously to the Court. The issue was solely damages. I would like to keep the trial one which doesn't prejudice the jury since we can't explain from our point of view what happened. It will be telling the jury, here is what happened.

I think the prefatory statement, if you gave it to the jury before the trial commenced, would get us into the trial without any prejudice.

THE COURT: Mr. Cullen.

[6] MR. CULLEN: This is the same piece of paper I objected to on the telephone. My objection is that it overlooks the claim against Mrs. Erlbaum and we contend that she is liable on this. This focuses on the sale of the contract. It is confusing.

I don't know that our contentior is only that the breach was intentional. We contend he intended that he breach.

Appendix B

THE COURT: Mr. Cullen, the problem arises if you are persisting in a claim for punitive damages and if you are then you may be opening up a whole area.

MR. CULLEN: Let me address that.

On the present state of the record on your Honor's ruling on the Motion in Limine and Mr. Windt's intention to appeal that decision, based on the present state of the record and the evidence that is going to be let in, we have decided in conferring with my client yesterday, to present as our damage claim—not to present at this trial punitive damages. I don't mean that is a waiver but if it came back for a trial, we are not waiving that information. We are not going to present evidence on punitive damages today or from the breach of the contract beyond the $150,000 payment of the check. So that our position is that . . .

THE COURT: You are not going to push for consequential damages?

[7] MR. CULLEN: That is correct,

THE COURT: Then we are talking about the down payment, 150?

MR. CULLEN: Right, plus interest.

THE COURT: In light of that, I see no harm at all in the preliminary statement. I am not—frankly it would give me no problem. It is really of no importance why a contract was breached. The important thing is it was breached. It doesn't matter whether it was done negligently, deliberately, or otherwise. A breach is a breach, so I have no problem with that.

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I am not sure I will use these words, but the concept will be that is all they are here to decide, and apparently you have conceded the breach.

MR. WINDT: In light of your Motion in Limine I am not allowed to put on a defense.

THE COURT: Then the jury is going to determine whether you are entitled to the $150,000.00.

MR. CULLEN: I intend to present some evidence on that point. We see the case a little differently . . .

THE COURT: You were talking originally the 150,000 but you were pressing that as part of the loss of bargaining.

MR. CULLEN: Correct.

THE COURT: Now how much is it. You are now [8] going to try to prove that your loss of bargaining was greater than 150?

MR. CULLEN: Yes.

THE COURT: We are talking purely and simply the $150,000 down payment?

MR. CULLEN: Correct.

THE COURT: We have a very simple issue then.

MR. WEINDT: That is all I have.

THE COURT: Thank you.

MR. CULLEN: In light of what was just said I have prepared a few Points for Charge just on the question of the UCC Section applicable to the promise to pay on a check, a draft. I have a feeling now that a couple of them may be more than I need, but I thought I could give them up at this point.

THE COURT: Tell me which ones you are withdrawing at the appropriate time. You can hand it in.

MR. CULLEN: I have photocopied the applicable section of the Pennsylvania Uniform Commercial Code. I proof read them myself. I saved Xeroxing.

THE COURT: All right. Then you will have the jury come up yet.

Good morning, Mr. Rosen.

(JURY SEATED)

[9] (The following took place in chambers.)

THE COURT: Now that I get word that you are ready to go, I am telling you that I just learned a few minutes ago that Gary Erlbaum, brother of Michael Erlbaum, is the son-in-law of a former client of mine with whom I was very close. As a matter of fact, that is how I learned about it. He called to tell me that he is going to be a spectator in my court room this morning.

MR. CULLEN: Gary Erlbaum's wife?

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THE COURT: Gary Erlbaum's wife—it is a jury trial. I feel I must tell you. It is understandable if I must recuse. I feel obligated to tell you. I just learned about it a short while ago.

MR. CULLEN: I don't think it makes a difference. I don't think it is within the bounds of what would lead to an appeal.

THE COURT: If it would create the appearance of lack of impartiality I will leave that up to counsel. If counsel is agreeable we will proceed.

MR. ROSEN: Mr. Erlbaum may be more than a spectator, depending on what happens. He may be a witness.

I have the upmost respect for you. Given the fact that he is my client and I don't want to hear any question whatsoever from anybody again regarding the impartiality—I have no problem with your impartiality but it might be best [10] for recusal.

THE COURT: It is all right with me.

MR. ROSEN: You never know where something like that can bite you. I certainly don't want to get into that.

I also feel very uncomfortable saying that because of the respect that I have for Your Honor.

THE COURT: I think under the circumstances, Mr. Cullen, I have to recuse.

It was unwittingly, I am sure, the 'phone call advising me that he was going to be a spectator. I am sure he had no idea of the possible complications. It is unfortunate because the case has come to the selection of the jury.

Appendix B

MR. CULLEN: It is very unfortunate. It is a huge expense to the Erlbaums who flew up from Texas to be here. I do not think it is a matter that requires recusal.

I bow to Your Honor's experience in these things. I frankly don't look at recusal quite often.

I question whether under prior rulings of the Court whether there is any point when Gary Erlbaum could speak materially. He was not in any way involved in any of the incidents which are still part of the case and I am uncomfortable for my clients that they have come all this way and incurred all this expense and can't go forward.

I respect Your Honor's decision. I am still [11] troubled by it.

I wonder if under the circumstances it isn't possible to go forward with this jury before another Judge if Your Honor is inclined not to go forward with it? It is a jury case. There are almost no rulings left. All the pretrial rulings were made before this came to light. We stipulated to the first five exhibits coming in.

I am going to read complaints and answers and there are a number of admissions in there. I am going to read a number of admissions of Michael Erlbaum from his deposition. I would have another person read the answers while I read the questions.

Thirdly, I intend to call Thomas Cream and have him testify just generally how things came to be that he owned the property and listed it for sale and resold it.

I am prepared to hand up at the close of the evidence Motion for a Directed Verdict. I think it is that clear a case.

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It is hard for me, given the posture of the case, with what the defendants have admitted in their pleadings, I can't see how Gary Erlbaum has anything to testify to.

THE COURT: Please wait out in the waiting room.

(End of In-Chambers discussion.)

(JURY OUT)

[12] (The following took place in open court.)

THE COURT: Before Judge O'Neal comes up, I have asked him if he would be willing to take this. He raised a question. He has represented Mr. Rosen on some questions and felt that probably would have nothing to do with anything but felt nevertheless I ought to mention it.

Maybe I am wrong. Maybe it was not Mr. Rosen he represented. As soon as he comes up he will clarify the situation.

I think he has on occasion represented lawyers when there has been a claim of some kind.

MR. ROSEN: The matter doesn't strike my memory.

THE COURT: His only concern is whether your opponent would have any objection.

Come in, Judge O'Neal.

He says it is another Paul Rosen.

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MR. ROSEN: It is not me.

JUDGE O'NEAL: I didn't realize there are two Paul Rosens.

THE COURT: Let me explain the situation.

This is a case where there was a contract to purchase an estate out of our part of the country, LaRonda, for a million dollars and for one reason or another there was a breach.

[13] The suit now is on the two drafts that were drawn by husband and wife on a cash reserve account and the drafts were dishonored and the suit, as I understood Mr. Cullen's statement, I made a ruling on a Motion in Limine. The ruling that I made caused the defendants to acknowledge that there is a breach. There is no defense.

The only issue is what amount of damages and the suit itself actually on these two drafts totalling $150,000.00 representing the down payment.

Have I correctly summarized?

MR. CULLEN: That is correct, with the reservation based on your prior rulings. We reserve the right . . .

THE COURT: There is also a claim for punitive damages which claim plaintiff is not going to press in light of the defendants announced intention to take an appeal ultimately from the—my ruling on the Motion in Limine.

Right now we have a very narrow issue, this claim being made for damages which is limited at this point by the plaintiff to the amount of the down payment.

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The signatory to the purchase, the real estate purchase contract, was the husband only, Michael Erlbaum, but the signatories to the drafts on the money market fund were husband and wife.

Now while the jury was being selected I received a 'phone call from a former client who advised me he was going [14] to be a spectator in my court room this morning. He advised me he is related to a person who may appear as a participant in these proceedings.

I put it to counsel and one of counsel has asked that I recuse myself but the plaintiffs have gone to the expense of flying here from Texas for this trial and Mr. Cullen has requested that the trial should proceed before some other judge.

We will take whatever time Judge O'Neal needs to familiarize himself with the facts in the case

The jury is selected but not sworn.

If you will agree to proceed with this we will accommodate every one.

JUDGE O'NEAL: We will move everyone down to my court room.

THE COURT: Very well. If counsel wishes to have an informal meeting with Judge O'Neal to further fill him in, then the swearing of the jury can take place now and—how would you prefer to handle it? Have them physically move to your court room, which is 14-B? Perhaps you might wish to swear the jury and bring them back after 2:00 o'clock which is after the judges' meeting.

Appendix B

JUDGE O'NEAL: Who are the parties to this case?

THE COURT: Clem versus Erlbaum.

MR. CULLEN: What is the original caption. It [15] is subsequently joined, but not the parties Arthur Kenyon and . . .

THE COURT: They are not involved in this contention.

JUDGE O'NEAL: In '70 or '71 I represented Fidelity Mutual, which was the inception of this whole thing, when they tried to deliver this transaction for this house, but that is no problem.

(HEARING CONTINUED IN COURT ROOM 14-B BEFORE JUDGE O'NEAL.)

APPENDIX C—EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1655

THOMAS E. and REBECCA J. CLEM,

Appellees

v.

MICHAEL and ELISABETH ERLBAUM,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

APPENDIX TO
BRIEF FOR APPELLANTS MICHAEL
ERLBAUM AND ELISABETH ERLBAUM

Paul R. Rosen
Allan D. Windt
Spector Cohen Gadon & Rosen,
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Appendix C

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Michael and Elisabeth Erlbaum

[Commencing at Page 12]

MR. WINDT: Unquestionably, your Honor. That would be my assumption also, and it was accepted by the plaintiff's agent, the auctioneer, and the plaintiff, Mr. Clem, testified at his deposition that the auctioneer told him that that was standard practice.

Regardless, your Honor, —

MR. MASTERSON: Your Honor —

THE COURT: We are not getting into that.

MR. WINDT: But, regardless, your Honor, —

THE COURT: We are not going to use parol evidence to open the door for parol evidence.

MR. WINDT: Okay. Regardless, your Honor, the point is, the parties began talking on that Friday, as Mr. Masterson just pointed out, before the 17th, before the checks would have come due.

The defense that my client has, your Honor, has nothing to do with the enforceability of the initial contract, which was clearly enforceable. The defense is that before the checks became

due, Saturday, that the parties entered into negotiations which led him to believe that he would not need to fund those checks and that in fact mutually-agreeable amendments to the terms of the contract would be satisfactory to all parties.

Let me just separate out, your Honor, our defenses from our counterclaim.

[13] With regard to our defenses, the defense is simply, one, essentially of waiver and estoppel, that we would have performed the terms of this clearly enforceable contract if the plaintiff had so insisted. Instead, the plaintiff agreed, or led us to believe that he would agree, to mutually-satisfactory amendments; not dealing with purchase price, dealing with date of closing and other minor changes.

Now, with regard to those defenses of estoppel and waiver or partial breach that we at most, if they had said fund those checks and do it soon, if we had even been a day or two late that would have been a partial breach which results in this case of damages of less than a thousand dollars for the amount of time that we were in breach since time was not of the essence.

But, looking at the defenses, your Honor, waiver and estoppel, the argument on the motion in limine that we can't set forth what are our only defenses, that we were led to believe that a new agreement would be forthcoming and that we did not yet need to fund the deposit monies, with regard to those defenses, your Honor, first of all, Mr. Masterson argues, well, it is precluded by Rule 408. In other words, even if it was undisputed—for instance, according to Mr. Masterson, that they led us to believe that don't fund the deposit monies, we will make some changes, and then the next week they say, oh, you are in breach, . . .

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[Commencing at Page 16]

We are talking about what was said in the discussions between the parties as to operative facts as to whether there was a waiver, whether there was an estoppel, and that's the only defense there is in this case.

The reason Mr. Erlbaum got himself in this perdicament is because he thought he didn't need to fund the deposit monies yet, that changes, minor changes, could be made to the contract. He thought that they were in the process of being made. Out of the blue he gets a letter from the plaintiff one day saying, I sold to someone else and we are going to sue.

So, as far as Rule 409 is concerned, clearly it has no applicability to this case because, number one, we are not talking about settlement discussions. In fact, your Honor, as Mr. Masterson points out, there was no breach prior to the time that the first discussions took place, the first discussions being—taking place on a Friday, the day before the post-dated checks, and we are contending that there never was any breach—

THE COURT: Excuse me just a moment. Doesn't the contract provide for $150,000 to be paid upon the signing?

MR. WINDT: It probably does, your Honor, but then there would clearly be a waiver by the plaintiff's agent who accepted the check. It was not like we snuck in by anyone, your Honor.

[Commencing at Page 20]

those promises can't be enforced.

Again, maybe they are right. So what? So what does the motion in limine have to do with that? They are saying we can't

defend ourselves? We are not looking, in terms of our defense, to specifically enforce any promises. In terms of our defense, all we are saying is we never breached—we can't be deemed to have breached the contract because the reason we didn't fund the checks, the reason we haven't bought the property and hadn't bought it before they sold it to someone else, is because we were misled or because the plaintiff waived the certain requirements in terms of the funding of the deposit monies.

So, the bottom line, your Honor is, we only have one defense, and the reason we have only one defense is because here is no question the initial contract was enforceable and the reason we have only one defense relates to why my client ended up in this predicament. He wanted to buy the property, he wanted to make certain adjustments in the terms of the contract. He thought the plaintiff was amenable. He thought the plaintiff was willing to say, okay, well, let's put off the settlement date, let's do this, let's do that, and as a result, when he is turned around and is sued and the property is sold to someone else, his only defense is, "I was misled; I thought that you were saying, you know, that you would be willing to do these things, . . .

[Commencing at Page 22]

MR. MASTERSON: 408.

THE COURT: — which of you improperly recited the number. I think it is 408. This is what gets us into 408 or 409.

What was going on here—and that's why I asked Mr. Masterson not to go into the content. I don't want to know who said what to whom or why. It is quite apparent that there was a written agreement which required certain things to be done.

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Something happened at which an attempt was made to alter, vary, modify the terms of that writing. That required a writing in order to accomplish. Even if the writing simply provided that while we are talking we will suspend some feature of this agreement, at the very minimum that is what this contract required. Any other interpretation would simply defy common sense and logic.

I am not relying on statute of frauds; I agree with you, statute of frauds addresses itself to enforceability. We are talking here parol evidence rule, and as an outgrowth of that, parol evidence rule and the provision of the agreement itself which requires that whatever will change, alter, this agreement, is required to be put in writing. That is what compels me to rule that none of the testimony concerning that which transpired over that weekend, or whatever the time frame was, may; be admissible, will not be admissible.

This case will be tried on damages only. That . . .

[Commencing at page 30]

MR. WINDT: I think you may by misinterpreting the ruling. If I may—

THE COURT: I am asking for your help.

MR. WINDT: Thank you, your Honor. The ruling, as it is set forth in the transcript, is because Michael Erlbaum signed the contract which had a provision in it saying that you can't orally modify the contract, that any negotiations or discussions between the parties which might result in waiver and estoppel, and therefore a defense, cannot be put into evidence, that is, we have no defense to liability, you can't change the terms of the

contract. Fine. But, as Judge Luongo then went on to say, the trial should be on damages. One of the issues in the damages trial is other offers, what was the property worth, mitigation, and I think—

THE COURT: I am not even sure that is relevant, to tell you the truth. There are two questions that occur to me. First, it appears to me that Judge Luongo has issued a very, very broad ruling. That is no my ruling, but I am bound by it. I don't mean to indicate I disagree with it. If the statement that you are trying to bring out occurred during the negotiations, events or transactions that he has ruled nothing said during that—that's the way he says it, doesn't he—will be admitted, then I am bound by that. That's number one.

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MR. WINDT: I am sorry, I don't know what portion you are referring to, your Honor.

THE COURT: That's what compels me to rule that none of the testimony concerning that which transpired over that weekend, or whatever the time frame was, may be admissible, will not be admissible.

Now, what I want to know is whether the statement you are attempting to contribute to the witness in his deposition—what time is it in this weekend of events, negotiations, whatever they were, that Judge Luongo has ruled is inadmissible.

MR. WINDT: It wasn't on a weekend; it was on Tuesday.

Your Honor, I never made this argument to Judge Luongo on damages. He never ruled against me that I couldn't use it as damages. It was solely a question a liability.

THE COURT: I understand that is your point, but I am trying to get down to what time did Judge Luongo refer to, and was this statement within that time? You need to know that.

MR. WINDT: I have no idea what time period he referred to. What he made clear was, whatever in a conversation may have happened which we would argue in our defense created waiver and estoppel I can't put in for waiver and estoppel. If you look at the pleadings, that's . . .

[Commencing at Page 34]

points. I am going to have to make up my mind on it without benefit of that.

MR. WINDT: I have to admit, Your Honor, I had thought, because of Judge Luongo's ruling, that in all events Mrs. Erlbaum's claim was going to the jury. Forgive me, I just was under that impression.

THE COURT: I think it is, but I am not—what I'm going to do is to deny your motion. This, of course, is without prejudice to its renewal at a later time, including after the jury verdict.

MR. WINDT: All right, Now we get to the point where I would ordinarily put on my case, Your Honor, and my case, as an offer of proof, would first consist of calling Arthur Spector to the stand to testify that the reason Michael never funded the down payment monies was because Mr. Spector told him not to.

And why did Mr. Spector tell him not to? Because agents for the Clems represented to Mr. Spector that it wasn't necessary

to do so, because of the ongoing negotiations to modify the contract, and because in fact the matter of the down payment was going to be increased.

THE COURT: That's really what has been precluded, however, by Judge Luongo's order, is it not?

MR. WINDT: Unquestionably.

Now, Your Honor had left an opening yesterday when [35] you said that Mr. Cullen could argue to the jury that the demand was made for the down payment monies. When I said if he is going to argue that I should be able to show as soon as they made demand they then changed their mind and said, you are right, don't bother, they said don't bother—

THE COURT: I think he is fulfilling his burden of proof under the code to show that a demand was made and the response was not forthcoming in order to establish his cause of action on the notes.

This matter, of course, is not before me for my own decision. I am precluded by Judge Luongo's order.

I am not suggesting that I disagree or agree with his order, but he was the Judge in this case, and he entered that order, so I think if we may take this as an offer of proof—and I assume that is agreeable to everyone—I will rule pursuant to Judge Luongo's order that the evidence will not be received.

MR. WINDT: All right. Let me just complete the offer of proof. We would then have other witnesses relating to the same conversations about the demand, about Michael Erlbaum's

willingness at all times to comply with the original terms of the written contract if the Clems had so desired.

I think there is enough in the record from the pleadings and from my oral arguments to the Judge, and from yesterday to Judge Luongo, that I don't have to go into [36] detail as to what each witness would testify, because Judge Luongo held it doesn't matter what anyone would testify; it is precluded as a matter of law.

THE COURT: I think probably counsel are in agreement—would this not be true, Mr. Cullen, this is a sufficient offer of proof, but I think probably you ought to name the witnesses.

Is that agreeable to you, Mr. Cullen?

MR. CULLEN: That's correct, Your Honor.

THE COURT: Why don't you name the witnesses who you would have offered in addition to the one you have named?

MR. WINDT: In addition to Arthur Spector would be Gary Erlbaum, Stephen Erlbaum, Michael Erlbaum, and Lisa Erlbaum or Elisabeth Erlbaum.

At that point, depending on how the testimony went, I may or may not have called parties adverse—

THE COURT: If you are making an offer of proof, you should make an offer of proof.

MR. WINDT: I would also call Mrs. Clem and possibly Mr. Clem on rebuttal.

THE COURT: This has nothing to do with rebuttal. You are making an offer of proof.

MR. WINDT: I meant as part of my case, not rebuttal.

THE COURT: I need a precise offer of proof in [37] order to rule on it. You can't say, "I might possibly call someone," and get a ruling from me as to whether that person's testimony would be received.

MR. WINDT: Well, Your Honor, Judge Luongo has ruled that regardless of what testimony I put on it would be irrelevant. You asked me to name the witnesses.

THE COURT: I am trying to give you an opportunity to perfect your record by making sure you make a full and complete offer of proof.

You have already stated the substance of what each witness would testify to, and Mr. Cullen has agreed that the Court may take that as an offer of proof for all the witnesses you name.

You now have to name all the witnesses that you are offering, and then I will rule.

MR. WINDT: All right. The first group of witnesses prior to the Clems would all testify that—

THE COURT: You have already said what they will testify to. You have already named all of them.

MR. WINDT: All right.

THE COURT: We are on the subject of Mr. and Mrs. Clem.

MR. WINDT: Mr. and Mrs. Clem.

THE COURT: If you want to make an offer of proof with respect to them, you must do so without any "possiblies," [38] or "maybes," or anything else.

MR. WINDT: All right. Thank you, Your Honor.

Mr. and Mrs. Clem would testify that Michael did not indicate to them that he would breach the contract; that he indicated to them that he would like them to do him a favor and is possible sell to someone else, and if they could do that, to the next highest bidder, with only a small loss to the Clems, Michael Erlbaum would make up the difference, and that he never terminated the contract, never breached the contract, and in fact, even prior to the Clems making up their mind whether to do Michael this favor, he requested—Gary Erlbaum called the Clems and said, "Forget it, we don't want you to do us any favors. We really do want to buy that property because the price was such a bargain."

That's all I have —

THE COURT: That's Mr. Clem. Do you have anything —

MR. WINDT: That's for Mr. and Mrs. Clem, both, Your Honor.

THE COURT: All right.

Now, in view of Judge Luongo's ruling, I will exclude the testimony which you have offered as to the witnesses whom you have named.

Appendix C

Are you going to have any other evidence?

MR. WINDT: No, Your Honor. Then we will offer no evidence whatsoever.